No. 477599

IN THE COURT OF APPEALS

DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MATTHEW GOINS, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

BRIEF OF APPELLANT

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ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Was the evidence insufficient to sustain a conviction for possession of a stolen vehicle where the State did not prove knowledge it had been stolen?

B. Was the evidence insufficient to sustain a conviction for identity theft, second degree based solely on simple possession of a credit card where circumstances did not give rise to an inference of criminal intent as a matter of logical probability?

C. Was the evidence insufficient to sustain a conviction for possession of stolen property based only on simple possession ?

II. STATEMENT OF FACTS

a. Procedural History

Pierce County prosecutors charged Matthew Goins by amended information with one count of possession of stolen property, one count of

possession of a stolen motor vehicle, one count of identity theft second degree, and one count of possession of a controlled substance, based on events of November 24, 2014. CP 7-9. The state gave notice on May 7, 2015 that it would seek a "free crimes" exceptional sentence at trial, per RCW 9.94A.535(2)(c). CP 27-28.

b. Testimony at Trial

In late November, 2014, David Glenn, a friend of Matthew Goins, told him about a 1982 motorcycle listed for sale on Craigslist. RP 223; 225. Mr. Goins had an interest in restoring older Honda and Yamaha motorcycles and was looking to spend between $1,000 and $1,500. RP 223;225.

He and Glenn arranged to meet the owner of the motorcycle, Jeremy Rainwater, at a 7-Eleven on the eastside of Tacoma. RP 224;230. Rainwater arrived in a pickup truck with a little trailer on the back, which held the motorcycle. Rainwater started the bike and Goins rode it around the block to make sure it was in working order. RP 224. Goins liked the bike and offered $500 down. They arranged to meet at the department of licensing the following day to transfer the paperwork, at which time Goins would pay him the other $500. RP 225. He received a bill of sale from Rainwater, which he placed in his girlfriend's car. (RP 226).

Although the bike did not have a key, Mr. Goins was not suspicious because the age of the bike and the dents and bodywork damage led him to believe it was quite likely the keys had gotten lost over the years. RP 225. The bike could be started by putting two wires together and pushing the start button. RP 180.

Goins drove the bike home, rode it around and the next day drove to Glenn's house to drop it off at his garage. RP 226. At some point, he ran out of gas and called Glenn to meet him. Glenn brought gas using Goins's girlfriend's car. Intending to do a "compression start" they hooked a towrope to the bike and the car. RP 227.

Around 5:45 a.m. on November 24, 2015, Officer Robillard was dispatched to check for a prowler at a house on 50th Ave. RP 165. When he arrived in the area, he saw what appeared to be a disabled car and a motorcycle parked in front of it. RP 167-68;169. He saw two men: Glenn at the passenger side of the car and Goins in front of the car. The hood of the car was up. RP 167-68;172. He saw a towrope. RP 168. As part of investigating the prowler call, he asked the men if they had knocked on the window of a nearby home. RP 168. They had not. RP 168. The officer spoke with the homeowner, looked around the outside of the house and concluded his investigation. RP 168.

Robillard returned to see if he could give the men some assistance. He said Goins told him they had towed the car with the motorcycle. RP 169-70. Goins was wearing an orange reflective vest and said he had been the one riding the bike. RP 171. Robillard wrote down and ran the license plate numbers from both the motorcycle and the car. RP 175. The motorcycle had been reported as stolen. RP 175. He requested assistance from other units and once they arrived, Goins and Glenn were taken into custody. RP 177.

Mr. Goins testified he tried telling the officer the bill of sale was inside the car; but the officer did not listen to him. RP 231-32. He later testified the car belonged to his girlfriend's deceased grandmother. Because the car was not in her name, his girlfriend was unable to later get the car released from impound, and could not get the bill of sale to prove the transaction. RP 232.

Officer Robillard disputed that Mr. Goins ever told him the bill of sale was in the car. RP 242. Robilllard also claimed that Mr. Goins told him he had had the bike a couple of weeks, had been working on the it, and planned to purchase it; but then said he had already purchased it for $1,000 from Jeremy Rainwater. RP 180;242.

Robillard conducted a search incident to arrest. Of importance, he located a baggy in his front coin pocket, the contents of which tested

positive for less than $1/10^{th}$ of a gram of methamphetamine and an American Express Card in the name of Jack Dalton. RP 178. Mr. Goins testified he found the American Express card in the street outside of a 7-Eleven in late November 2014. RP 228. He placed it in his wallet with the intent to get it to its rightful owner. He never used the card. RP 228.

Jack Dalton testified his wife's purse, which contained the American Express card had been stolen in January 2014. RP 151. He had reported the card stolen and had no recollection if there had ever been an unauthorized charge on the card. RP 152.

Office Antush testified she took a report for a stolen 1982 Honda motorcycle approximately two months earlier on September 29, 2014. RP 89. The owner, Jeffrey Elmore, testified he had acquired the bike to restore it. RP 98. He said in September of 2014, when they reported it as stolen, the bike was not charging properly and would not start. RP 100-101. When he retrieved the bike on November 24, 2014, approximately two months later, a number of the parts he had restored were missing and the ignition lock was broken and removed. RP 106-107.

During deliberations, the jury sent one question to the court:

> If a person finds an item on the ground, how do you know if the item is/was stolen ? Instruction 27, item 2. (CP 51).

The court instructed the jury to reread the jury instructions. (CP 51).

The jury convicted Mr. Goins on all counts. CP 100-101. On June 25, 2015, Judge V. Hogan imposed an exceptional sentence of 75 months. CP 106. Mr. Goins makes this timely appeal. CP 122.

III. ARGUMENT

Every person accused of a crime is constitutionally endowed with an overriding presumption of innocence, a presumption that extends to every element of the charged offense. *Morissette v. United States,* 342 U.S. 246, 275, 72 S.Ct. 240, 256, 96 L.Ed. 288 (1952); *State v. McHenry,* 88 Wn. 2d 211, 558 P.2d 188 (1977). The State must prove all the elements of a charged crime beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Sufficiency of the evidence is a question of constitutional magnitude and may be raised for the first time on appeal. *State v. Baeza,* 100 Wn.2d 487, 488, 670 P.2d (1983).

The standard for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). While all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against

the defendant, inferences drawn from circumstantial evidence "must be reasonable and cannot be based on speculation." *Salinas,* 119 Wn.2d 201; *State v. Vasquez,* 178 Wn.2d 1, 16, 309 P.3d 318 (2013)(citing *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Where the prosecution fails to meet the burden of proof beyond a reasonable doubt, the remedy is reversal and dismissal with prejudice. *State v. Hickman,* 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

1. The Evidence Was Insufficient To Sustain A Conviction For Possession Of A Stolen Motor Vehicle.

The State charged Mr. Goins with one count of possession of a stolen vehicle under RCW 9A.56.068, which provides, a person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle. "Possession" of stolen property is defined as: knowingly to receive, retain, posses, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto. RCW 9A.56.140. Thus, to sustain a conviction for possession of a stolen motor vehicle, the State was required to prove beyond a reasonable doubt that (1) the vehicle was stolen (2) that the defendant knew it was stolen and (3) he possessed it. RCW 9A.56.068;RCW 9A.56.140.

The State presented evidence that Mr. Goins knowingly possessed the vehicle, however, in dispute here is whether Mr. Goins had knowledge the vehicle was stolen. Possession absent that knowledge is insufficient to sustain the conviction. *State v. McPhee,* 156 Wn.App. 44, 62, 230 P.3d 284 (2010).

In *Portee*, the Court reasoned that by itself, possession of stolen property is insufficient to show guilt. *State v. Portee,* 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946). There must be corroborative evidence by other inculpatory circumstances to establish knowledge the property was stolen. For example, a suspect makes an attempt to flee, gives an improbable explanation, produces a forged bill of sale, or offers a fictitious name or information which cannot be verified. Coupled with those types of circumstances, possession of stolen property allows a reasonable inference of guilty knowledge. *Portee,* 25 Wn.2d at 254.

Here, there was no indicatory evidence on collateral points. Rather, Mr. Goins remained with the motorcycle and the car while the officer left to check on the prowler. He did not flee or attempt to flee. When questioned, he explained he had purchased or was in the process of completing his purchase of the bike. He gave the name of the individual who sold the bike to him, which was easily verifiable. His explanation about a lost key to the 1982 motorcycle was plausible. Furthermore, Mr.

Goins testified he did not have the registration because he had not made the final payment on the bike.

Here, the evidence of possession of the stolen property is more likely or equally consistent with innocence as it is with guilt and thus, is not sufficient to support a conviction; it is not substantial. *State v. Aten,* 130 Wn.2d 640, 927 P.2d 210 (1996). Mr. Goins respectfully asks the Court to reverse his conviction, based on insufficient evidence, and dismiss with prejudice.

2. The Evidence Was Insufficient To Sustain A Conviction For Identity Theft, Second Degree.

To sustain a conviction for identity theft, the state was required to prove that Mr. Goins knowingly obtained, possessed, used or transferred "a means of identification or financial information of another person" and that he acted with the intent to commit a crime. RCW 9.35.020(1). (CP 76). Here, the State presented evidence that Mr. Goins knowingly possessed the American Express card, but did not present evidence to establish intent to commit a crime.

Intent is "typically proved through circumstantial evidence, "[i]ntent may not be inferred from evidence that is 'patently equivocal'." *State v. Woods,* 63 Wn.App. 588, 592, 821 P.2d 1235 (1991). Intent may be inferred from all the circumstances as a matter of logical probability,

however, inferring intent from mere possession relieves the State of its burden to prove intent beyond a reasonable doubt as an essential element of the charged crime. *Vasquez*, 178 Wn.2d at 13.

Here, in closing argument the prosecutor stated:

> "Well, how do we determine if he intended to commit a crime? Well, where did he have that card? It was in his own wallet on his person. What do you put in a wallet? Things you intend to use: cash, credit cards, identification…Because its accessible, it's on you, you intend to use what's in your wallet….A credit card with a photo that generally fits your own description. The defendant intended to use that credit card. Therefore, he intended to commit any crime with it." RP 268-69.

In *Vasquez*, the Court resoundingly concluded that the record disclosed insufficient evidence of intent to injure or defraud beyond a reasonable doubt, based on possession of forged ID cards. *Vasquez*, 178 Wn.2d at 7. The Court made clear that possession of the forged ID cards, and acknowledgment they belonged to him, did not support an inference the defendant intended to injure or defraud. *Id.* at 10.

The Court used the reasoning of *Brockrob* and other drug related cases to conclude, "Just as mere possession of a controlled substance does not support an inference of an intent to deliver or manufacture, neither does mere possession of forged identity cards support an inference of an intent to injure or defraud." *Vasquez*, 178 Wn.2d at 9-10.

The *Vasquez* Court held that the question, "And why else would Mr. Vasquez have them?" was insufficient to establish intent. *Vasquez*, 178 Wn.2d at 13. Similarly, here the State's entirety of proof of the element of intent depended on the fact that the card, which had been lost or stolen approximately a year earlier, was in Mr. Goins' wallet. This is nothing more than an inference of intent to commit a crime from the fact of possession.

The State contended the element of intent had been met because "What do you put in a wallet? Things you intend to use." The State presented no corroborating evidence that would substantiate criminal intent "as a matter of logical probability." *Vasquez*, 178 Wn.2d at 14-15. Even viewed in a light most favorable to the State, the evidence of possession is insufficient. Like *Vasquez*, Mr. Goins asks this Court to reverse the conviction for identity theft.

3. The Evidence Was Insufficient To Sustain A Conviction For Possession of Stolen Property.

A person commits the crime of possessing stolen property in the second degree when he knowingly possesses a stolen access device. RCW 9.56.160(1)(c); CP 81. The Washington criminal code defines possession of stolen property, in relevant part, as "knowingly to receive, retain, or possess…stolen property knowing that it has been stolen and to withhold

or appropriate the same." RCW 9A.56.140(1). Where the criminal statute requires knowledge property is stolen, bare possession alone is not sufficient to justify a conviction. *State v. Couet,* 71 Wn.2d 773, 775, 430 P.2d 974 (1967). Ordinarily, the element of guilty knowledge must be found by inference from all the facts and circumstances. *State v. Salzman,* 186 Wash. 44, 47, 56 P.2d 1005 (1936).

As with the identity theft conviction, the jury was required to find beyond a reasonable doubt that Mr. Goins knowingly possessed a stolen credit card. Here, the State presented evidence that Ms. Dalton's purse and credit card had been stolen in January 2014. Between the time period of January 2014 and November 29, 2014, there was no evidence of where the card had been, and no evidence that it had ever been used in an illegal manner. Mr. Goins testified he found the card in the parking lot of a 7-Eleven right around November 29 and put it in his wallet to return it to the owner. " When there is an innocent explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, the government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one." *United States v. Vasquez-Chan,* 978 F.2d 546, 549 (9th Cir. 1992). As argued above, the State failed to prove beyond a reasonable doubt that Mr. Goins acted with the knowledge that

property had been stolen. Mr. Goins respectfully asks this Court to reverse his conviction for insufficient evidence and dismiss the charge with prejudice.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Goins respectfully asks this Court to reverse his convictions because the State failed to provide sufficient evidence that he knowingly possessed stolen property or intended to commit a crime. He further asks that at a resentencing, where the convictions are vacated, that the superior court be instructed to vacate the exceptional sentence based on "free crimes" and he be resentenced based solely on the remaining count, within the standard range.

Submitted this 21st day of December 2015.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury of the laws of the State of Washington, that on December 21, 2015 I mailed, by USPS, first class, postage prepaid, or served by electronic service by prior agreement between the parties, a copy of the appellant's opening brief to the following:

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